

**REMARKS*****Status***

Claims 1-16 and 18-36 are currently pending. No claims are newly added, canceled or amended as a result of filing this After Final Response.

***Claim Rejections Under 35 U.S.C. §§ 102 and 103***

Claims 1-7 and 36 stand rejected under 35 U.S.C. § 102 as purportedly being anticipated by Romaine *et al.* (U.S. Patent No. 4,803,800; hereinafter referred to as “the ‘800 patent”); and claims 8-16 and 18-35 under 35 U.S.C. § 103 as purportedly being unpatentable over the same reference.

Applicant provided a Declaration Under 37 C.F.R. § 1.132 (Rule 132) by Dr. C. Peter Romaine (“the Romaine Declaration”) with the previously-filed Response and Amendment Under 37 C.F.R. § 1.111. As explained therein, Dr. Romaine is the principal inventor of the invention disclosed and claimed in the ‘800 patent cited by the Examiner. As set forth in the Romaine Declaration and his accompanying 43 page Curriculum Vitae (Exhibit A to the Declaration), Dr. Romaine is a recognized expert in the field of mushroom genetics and mushroom cultivation. The Romaine Declaration provides clear and convincing arguments as to the reasons why the ‘800 patent completely fails to render the presently-claimed invention unpatentable.

The Romaine Declaration was not taken into account by the Examiner. In the Response to Arguments in the Final Office Action of July 6, 2005, the Examiner asserted that “the Declaration cannot be employed to overcome a rejection under 102(b) (see MPEP chapter 2100)”. **Applicant can find nothing in the M.P.E.P. Chapter 2100 that supports the Examiner’s position.**

Reference is made to declarations at M.P.E.P. section 2133.2:

“A rejection under 35 U.S.C. 102(b) cannot be overcome by affidavits and declarations under 37 CFR 1.131 (Rule 131 Declarations), foreign priority dates, or evidence that the applicant himself invented the subject matter”.

**However, this refers only to Rule 131 declarations, *i.e.*, declarations intended to antedate a reference or activity. No reference whatsoever is made in this passage to Rule 132 declarations, *i.e.*, declarations traversing rejections or objections. The Romaine Declaration is a**

declaration under Rule 132. Therefore, there is nothing in M.P.E.P. Chapter 2100 to suggest that the Examiner may refuse to admit this declaration in response to a 102(b) rejection.

Indeed, Applicant submits that the M.P.E.P. supports the contrary position, that the Examiner must admit and consider the Romaine Declaration. Section 2111.01 of the M.P.E.P. sets out that the words of the claim must be given their “plain meaning” unless they are defined differently in the specification. This “plain meaning” refers to the ordinary and customary meaning given to the term by those of ordinary skill in the art. The Romaine Declaration sets out the ordinary and customary meaning of the term “mushroom compost supplement” to one skilled in the art of mushroom growing. Thus, it must be taken into account for the assessment of claim meaning.

The Romaine Declaration has already been placed on file. It shows that one skilled in the art would readily appreciate that the “synthetic mushroom spawn or CACing materials” taught in the ‘800 patent are “distinctly different material” than the “mushroom supplement” claimed in the present application.

As stated in the Romaine Declaration, mushroom spawn is “the fungal equivalent of plant seed”, “by definition must be colonized with a mushroom fungus”, and has the primary function of inoculating the mushroom growing substrate (*i.e.*, the compost). In contrast, mushroom compost supplement has the primary purpose “to deliver supplementary nutrients to the mushroom growing substrate”.

The Romaine Declaration shows that a person of ordinary skill in the art would consider a fungal spawn and a mushroom compost supplement to be distinct compositions. The present claims are therefore not anticipated by the ‘800 patent. It is noted that Romaine, being the author of the prior art cited by the Examiner, is not a person having interest in the grant of the present application. Therefore, Applicant submits that there is no reason why the Romaine Declaration should not be accepted by the Examiner as a true reflection of the ordinary and customary meaning in the art.

Furthermore, the customary meaning as set out in the Romaine Declaration is consistent with the definition given in the specification as filed. The specification states that:

“As used herein, the term “mushroom compost supplement” refers to a nutrient material or mixture of nutrient materials that is added to mushroom compost. Mushroom compost supplement may be added to mushroom compost at any time, including, for example, at spawning and at the time of casing” (page 12 lines 1 to 4).

The statement that the mushroom compost supplement is a nutrient material or mixture of nutrient materials is in keeping with the customary meaning as set out in the Romaine Declaration. The mushroom compost supplement has the primary purpose of delivering supplementary nutrients to the mushroom growing substrate.

The statement that the compost supplement may be added to mushroom compost at any time further illustrates that the composition is distinct from a mushroom spawn or CACing composition. A mushroom spawn or CACing spawn composition by definition can only be used at spawning or CACing steps respectively, and not at any time. This may be better understood by considering the analogy with plants. A plant fertilizer can be added to the soil at any time (e.g., before or after planting) but a plant seed by definition can only be added to the soil at the time of planting.

The customary meaning as understood by one of skill in the art and the definition provided in the specification are therefore consistent. Both would lead the skilled person to conclude that the ‘800 patent does not teach a compost supplement and does not anticipate the claims.

Applicant therefore requests review of the Examiner’s position in the light of the Romaine Declaration and withdrawal of the claim rejections. In the event that the Examiner maintains the position that the Romaine Declaration cannot be taken into account, we ask the Examiner to expressly quote the wording of the part of the M.P.E.P. which provides authority for that position.

For all of the reasons made of record by the Applicant and in view of the Romaine Declaration, the Examiner is respectfully requested to withdraw the prior art rejections and allow the claims to issue.

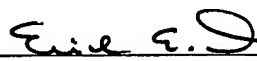
***Conclusion***

The amendments made herein are fully supported by the as-filed specification, and as such, no new matter has been added by way of the present amendment. Therefore, Applicants respectfully submit that the instant application is in full condition for allowance. Favorable examination of the claims on the merits is respectfully requested.

The Examiner is invited to contact the undersigned if any issues remain outstanding after consideration of this After Final Response.

Respectfully submitted,

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